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S. M. Brandt and *R. T. Thorp, Jr.*, both of Norfolk, for plaintiff in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and Leon M. Bazile, Second Asst. Atty. Gen., for the Commonwealth.

PERKINS *v.* NORFOLK & W. RY. CO. et al.

Jan. 19, 1922.

[110 S. E. 927.]

Action by E. H. Perkins, administrator of Luther Perkins, deceased, against Walker D. Hines, Director General of Railroads, and another. From a judgment for defendants, plaintiff appeals. Affirmed by an equally divided court.

W. B. Snidow, of Pearisburg, for plaintiff in error.

Jas. D. Johnston, of Roanoke, and *Williams & Farrier*, of Pearisburg, for defendant in error.

PER CURIAM. Affirmed by an equally divided court.

RHINEHART *v.* PIRKEY.

Jan. 19, 1922.

[110 S. E. 927.]

Action between one Rhinehart and one Pirkey. Judgment for Pirkey, and Rhinehart brings error. Affirmed by equally divided court.

Haden & Haden, of Fincastle, for plaintiff in error.

O. B. Harvey, of Clifton Forge, for defendant in error.

PER CURIAM. Affirmed by an equally divided court.

JACOBS *v.* COMMONWEALTH.

March 16, 1922.

[111 S. E. 90.]

1. Homicide (§ 13*)—Law Implies Malice from Killing with Pistol. —Even though the defendant and deceased had been on good terms

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

prior to the shooting, the law implies malice from the fact that defendant had armed himself with a pistol "for use if anything should happen," and that with the pistol he shot deceased in the back and killed him.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 114.]

2. Homicide (§ 43*)—Provocation Does Not Reduce Killing to Manslaughter unless It Arouses Passion.—Provocation will not reduce homicide from murder to manslaughter unless it has so aroused the anger of the assailant as temporarily to affect his reason and self-control, since both provocation and passion must exist.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 122.]

3. Homicide (§ 282*)—Whether Provocation Produces Passion Sufficient to Reduce Offense to Manslaughter Is Jury Question.—When there is room upon the evidence for difference of opinion, the question whether the alleged provocation sufficiently operated on the mind of accused to rebut the presumption of malice arising from the killing, and reduced the grade of the offense to manslaughter, is one for the jury to determine, under instructions from the court as to the nature and extent of provocation.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 154.]

4. Homicide (§§ 11, 22 (2)*)—Test of Murder Is Malice; Deliberation and Premeditation Elements of First Degree Murder.—The test of murder is malice, and every malicious killing is murder in the first or second degree; the former if deliberate and premeditated, and the latter if not.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 114.]

5. Homicide (§§ 146, 147, 152*)—Malice, but Not Deliberation and Premeditation, Presumed; Every Homicide Is Prima Facie Second Degree Murder.—There is a prima facie presumption of malice arising from the mere fact of a homicide, but no presumption of deliberation and premeditation, and every homicide is prima facie murder in the second degree, and the burden is on the accused to reduce and on the commonwealth to elevate the grade of the offense.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 115.]

6. Criminal Law (§ 557*)—Defendant May Rely on Extenuations Shown by Prosecution's Evidence.—Defendant may rely upon circumstances of extenuation appearing in the evidence produced by the commonwealth to the same extent as if they were brought out in his evidence in reducing the grade of the homicide.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 638.]

7. Homicide (§ 269*)—Existence of Malice Is Generally Question for Jury.—Whether malice exists in a particular case is usually a question for a jury, and the significance of the words and conduct addresses itself peculiarly to the consideration of the jury; but in

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perfectly clear cases the evidence may be held not to show malice though the jury found its existence.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 154.]

8. Homicide (§ 271*)—Sufficiency of Provocation Is Question of Law, and Its Existence a Question of Fact.—The sufficiency of provocation to excuse or extenuate murder is generally a question of law, but whether such provocation exists in a particular case is a question of fact.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 120.]

9. Homicide (§ 48*)—Assault on Defendant's Mother Is Sufficient Provocation to Reduce Killing to Manslaughter.—An assault by deceased upon defendant's mother, in which he struck her with his fist and knocked her down, is ample provocation for passion on the part of accused which would reduce the killing from murder to manslaughter.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 124.]

10. Homicide (§ 239*)—Evidence Held to Sustain Finding Killing Was Malicious, and Not Caused by Provocation.—In a prosecution for homicide, committed after deceased had knocked defendant's mother down, where defendant did not claim to have acted in sudden passion produced by the assault on his mother, but falsely testified deceased was threatening his mother with a pistol, and that he fired the first shot to defend his mother, and the other shots to defend himself, evidence held to sustain a finding that the provocation did not produce passion on the part of defendant.

Burks, J., dissenting.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 124.]

Error to Circuit Court, Northampton County.

James Jacobs was convicted of murder in the second degree, and he brings error. Affirmed.

J. Brooks Mapp, of Keller, for plaintiff in error.

John R. Saunders, Atty. Gen., *J. D. Hank, Jr.*, Asst. Atty. Gen., and *Leon M. Bazile*, Second Asst. Atty. Gen., for the Commonwealth.

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